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NATIONAL LABOR RELATIONS BOARD

ANTHONY PAPPAS vs. UNITED STATES POSTAL SERVICE, GARAGE VEHICLE MAINTENANCE FACILITY	Case No: 21-CA-25278 (P) **REQUEST FOR REVIEW OF GENERAL COUNSEL'S DENIAL OF APPEAL FROM REGIONAL DIRECTOR'S ADMINISTRATIVE DETERMINATION TERMINATING BACK PAY**

I. INTRODUCTION

Anthony Pappas (hereinafter "Appellant") files this Request for Review from the General Counsel's denial of Appellant's appeal from the Regional Director's administrative determination terminating back pay on the basis that the Appellant has received back pay beyond the date of his early retirement age. The General Counsel's dismisses the appeal based upon the Regional Director's reasoning. Region 21's recent decision to simply terminate the Appellant's right to seek continuing back pay benefits without hearing or evidence is unjustified and arbitrary. Material issues of fact exist as to whether the Appellant is entitled to a continued back pay remedy. In particular, the propriety of limiting any back pay remedy can only be resolved on the basis of competent evidence before an Administrative Law Judge. The Appellant, therefore, respectfully requests that the matter of Appellant's continued right to back pay must be resolved on the basis of formal findings of fact by an Administrative Law

Judge.

II. STATEMENT OF FACTS

The Appellant first began his employment with the United States Postal Service (hereinafter "Employer") on May 23, 1977. In January 1, 1984, the Appellant was promoted to the position of Supervisor, Vehicle Maintenance. On or about June 16, 1986, the Appellant testified at an arbitration hearing regarding a postal union representative working for the American Postal Workers Union. On or about October 25, 1986, the Appellant was demoted by the Employer from his supervisory position because the testimony he gave at the June 1986 arbitration hearing favored the union. On March 3, 1987, Appellant filed an Unfair Labor Practice Charge alleging that his employer, the United States Postal Service (hereinafter "Employer") initiated termination proceedings and, thereafter, demoted him in October, 1986, in retaliation for protected activities. As part of the Charge, the Appellant sought a continued make whole remedy because the Employer's retaliatory conduct had caused the Appellant severe emotional distress, resulting in a psychological condition that rendered him incapable of working.

On June 10, 1993, the Employer and the General Counsel of the National Labor Relations Board entered into a settlement stipulation ("Settlement Stipulation"), which provided for an entry of a consent order by the Board and a consent judgment by the United States Court of Appeals. On or about August 5, 1993, the National Labor Relations Board issued its decision and order. That order, *inter alia*, required the Employer to:

> Make whole Anthony Pappas for any loss of pay and benefits he may have suffered, and may continue to suffer, as a result of his demotion from his position as a supervisor with interest to be paid on the amounts owing as computed in accordance with New Horizons for the Retarded [citation omitted.]

On or about June 27, 2000, the Regional Director for Region 21 of the NLRB issued a compliance specification. Thereafter, in 2003, the Employer executed, together with the general counsel for the National Labor Relations Board, a stipulation (hereinafter "2003 Stipulation") requiring it take various actions. A true and correct copy of the 2003 Stipulation

is attached hereto as Exhibit A.

The September 2003 Stipulation provided in paragraph 7 the following:

> Pappas has not yet returned to work at the Postal Service. Therefore, this Stipulation settles only the issues regarding the Postal Service's back pay liability for April 22, 2000 through June 12, 2004. The General Counsel contends the Postal Service's unfair labor practices have rendered Pappas psychologically incapable of performing his job duties. The General Counsel also contends that the back pay period and the obligation to reinstatement to Pappas continues to run until the time that the Postal Service can demonstrate that Pappas is no longer disabled and can return to work. Thus, the General Counsel reserves the right to issue further compliance specifications and litigate all issues concerning Pappas's entitlement to reinstatement at the Postal Service and his entitlement to back pay and other benefits accruing after June 12, 2004 at a subsequent hearing or hearings. The Postal Service reserves the right to raise all defenses available to it at the subsequent hearing or hearings, including any defenses to the allegations that any Unfair Labor Practice the Postal Service have rendered psychologically incapable of performing his job duties or that the back pay period or obligation to offer reinstatement to Pappas continues to run until the time that the Postal Service can demonstrate that Pappas is no longer disabled and can return to work. The Postal Service also reserves the right to dispute and litigate any amounts of back pay and benefits allegedly owed to Pappas asserted to accrue after June 12, 2004, as might be alleged in subsequent compliance specifications.

Despite its efforts to send the Appellant to fitness for duty exams or secondary medical opinions (to which the Appellant has submitted), the Employer has failed to rebut the fact that the Appellant is in fact temporarily and totally disabled as a result of the Employer's unlawful conduct.

Beginning in 2007, the Employer initiated in a disingenuous scam disguised as an effort to reasonably accommodate the Appellant's disability. By letter dated March 7, 2007, the Appellant was informed by Los Angeles Post Office District Reasonable Accommodation Committee ("DRAC") Chairman that the Appellant was requested to explore a reasonable accommodation for the Appellant which would allow him to return to work. The DRAC Chairman's letter announced that the Appellant's ". . . name was submitted to the reasonable accommodation committee to discuss our ability to accommodate your restrictions . . .." Pursuant to repeated requests from the Appellant, he was eventually supplied with a

document entitled "Handbook EL-307.2 The Reasonable Accommodation Process." The reasonable accommodation process set out in that document requires that a request for reasonable accommodation must be submitted by the affected employee "or someone acting on an employee's/applicant's behalf." However, participation in the reasonable accommodation process is optional for the affected employee – and, moreover, is completely inapplicable to an employee that is temporarily, totally disabled.

The Appellant, nor anyone acting on his behalf, ever requested any reasonable accommodation, so the very foundation of this so-called reasonable accommodation process (which was, in any event, voluntary and optional) was illegitimate from its inception. To date, the Employer has failed and refused to provide any relevant documentation concerning the implementation of this plan vis-à-vis the Appellant.

The Reasonable Accommodation Process handbook supplied to the Appellant specifically applies the reasonable accommodation process to but three situations. Those three situations include, when an applicant requests a reasonable accommodation, when a decision must be made with respect to a job applicant's ability to perform the functions of a job he is currently performing or when an employee requests some accommodation so that he or she is able to perform his or her current job. On its face, none of these three particular situations are triggered in the instant matter.

The reasonable accommodation process is the subject of detailed federal regulations, including 20 CFR 10-515, which states that when an employee is able to resume their regular duties, they must do so. However, in the present matter, no one has ever contended that the Appellant can return to his regular employment. The second part of the cited federal regulation addresses only situations where an employee cannot return to the job he held at the time of the injury, but who is recovered enough to perform some type of work. This situation is limited, according to the regulation, to instances where an employee suffers from a "partial disability." No one has ever contended that the Appellant suffers from a partial disability.

Rather, the authoritative medical opinion and factual findings by the Office of Workers'

Compensation Programs ("OWCP") are that the Appellant is currently totally disabled from work. The OWCP officially designated treating physician Peter J. Weingold (erroneously referred to be the Regional Director as 'Appellant's medical provider") issued a September 9, 2009, letter wherein he provides the following:

> As his treating psychiatrist, I must strongly object to this examination. First of all, his status in terms of his inability to return to work has been and continues to be determined by the OWCP. Your insistence that he undergo a [Fitness for Duty Examination] only serves to exacerbate his accepted condition. The ongoing attempts by the USPS to force [Appellant] to return to work prematurely only serves to delay his possible recovery. As you must know, there are ongoing issues of a similar nature that are still unresolved referring to the National Labor Relations Board.

Throughout the history of this case, Dr. Weingold has issued various medical determinations regarding the Appellant's medical condition, including a report, dated November 18, 2007, wherein he opined:

> [Appellant's] condition remains one of temporary, total disability on a psychiatric basis directly and solely the result of industrial factors enumerated above and in previous reports.

On January 23, 2009, Dr. Weingold issued yet another report explicitly stating that the Appellant cannot be employed anywhere at the present time.

On June 8, 2009, Dr. Weingold wrote a report, reiterating that, "[b]ecause [the Appellant] remains unable to perform work of any kind" and, further, noted that communications between the Employer and the Appellant should be handled by the OWCP's office due to the animus between the parties, which would serve only "to exacerbate his psychiatric condition and prolong his disability."

Since the Employer signed the 2003 Stipulation after the issuance of the first compliance specification, from time to time thereafter, Region 21 would issue subsequent compliance specifications requiring, *inter alia,* that the United States Postal Service pay the Appellant back pay, benefits, etc.

By June 15, 2009, Region 21 issued a compliance specification and notice of hearing. This compliance specification stated, in paragraph 1:

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> The back pay period for Pappas commences on November 24, 1986, at which time he was unlawfully demoted from his position of Vehicle Maintenance Supervisor. As a result of Respondent's unfair labor practice, Pappas has been rendered psychologically incapable of performing his duties. Thus, the back pay period and the obligation to offer reinstatement continues to run until the time that Respondent can demonstrate that Pappas is no longer disabled and can return to work.

The compliance specification went on to recount that through prior stipulations and compliance specifications, the Appellant had been made whole for back pay, interest and other benefits from the date of his unlawful demotion through September 30, 2006. This latest compliance specification then sought back pay and benefits from the period October 1, 2006 through January 2, 2009. Finally, that compliance specification specifically left, "all liabilities accruing after January 2, 2009 . . . for future compliance and/or supplemental proceedings."

Thereafter, on August 21, 2009, the Employer filed a Motion for Summary Judgment taking the position that Appellant had already been made whole and the matter should cease. The Employer's Motion was initially denied, but the Employer also moved for a "brief postponement of the hearing" which was granted by ALJ Cracraft and the matter remanded "to the Regional Director for Region 21 to set a new hearing date." The Order postponing the hearing was issued September 2, 2009.

On September 2, 2009, the NLRB Agent responsible for this matter, Cecilia Valentine, sent an email announcing that Judge Cracraft had granted the Motion for Postponement of the hearing, offered available dates, and stated "we need to reschedule the hearing as soon as possible." A true and correct copy of this email is attached hereto as Exhibit B.

One of the arguments raised by the Employer in its Motion for Summary Judgment was that the Appellant had failed to mitigate its damages. By letter dated October 22, 2008, the Compliance Officer of Region 21 states that "The NLRB's division of advice concluded that back pay was appropriate in this case until the Postal Service either shows the Charging Party's disability does not prevent him from working or that he would no longer be working for the Postal Service (e.g. at retirement age.)" The advice memorandum referred to by the

Compliance Officer was never disclosed to either the Appellant or his attorney and he is therefore unaware of what that memorandum provides and whether it states that back pay would terminate at retirement or whether or not "retirement age" was an interpretation of the advice memorandum by the Compliance Officer. The October 22, 2008 compliance letter sought evidence from the Appellant with respect to the issue of mitigation and damages.

By letter, dated December 10, 2009, the Appellant responded with thorough documentary evidence showing that reliance on the "reasonable accommodation" process was improper and disingenuous because, *inter alia,* the only existing medical opinion is that the Appellant is and continues to be temporarily "totally disabled" – thus precluding any conceivable accommodation at this time.

Meanwhile the "brief" postponement of the hearing lasted over six months, until March 12, 2010, when Region 21 notified the Appellant of a wholesale reversal in its position. After issuing the final compliance specification, Region 21 suddenly announced that it now believed that the Appellant had been made whole to accomplish the purpose of the Act and, thereafter, terminated the Employer's back pay obligation. Specifically, on May 10, 2010, Regional Director, James Small, issued a decision holding that the Appellant should not be entitled to any back pay beyond the date of his early retirement – March 2007– when he attained the age of 60.

Never and nowhere has Region 21 adequately explained its sudden and wholesale change of positions. Moreover, at no time has Region 21 afforded the Appellant notice and opportunity to contest this decision at a hearing.

III. ARGUMENT

A. THE BOARD'S TERMINATION OF APPELLANT'S BENEFITS WAS ARBITRARY AND UNJUSTIFIED BECAUSE UNRESOLVED ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE APPELLANT IS ENTITLED TO CONTINUING BACK PAY

The Board's recent decision to deny the Appellant back pay is arbitrary because there remain issues of material fact as to whether the Appellant is entitled to continuing back pay. The Settlement Stipulation, which was executed on June 10, 1993, provides, *inter alia,* that the

Employer shall make the Appellant whole *"for any loss of pay and benefits he may have suffered, and may continue to suffer, as a result of his demotion from his position as a supervisor."* This Board order was enforced – without qualification – by the Ninth Circuit Court. The Regional Director's recent decision to unilaterally eliminate the Appellant's right to continued back pay without hearing or formal findings of fact does not comport with the standards employed for limiting back pay.

It has long been settled that a make whole back pay order can only be limited upon hearing on the basis of formal findings of fact. Specifically, the Board utilizes a burden shifting procedure whenever an employer seeks to limit a back pay award. That is, once the gross amount of back pay due is established, the burden shifts to the wrongdoer to prove circumstances that would limit its liability. See *NLRB v. Joyce Western Corp.*, 873 F.2d 126, 128 (6th Cir. 1989). Any doubts about the alleged affirmative defenses are resolved against the employer who committed the unfair labor practice. *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972).

Here, the Regional Director's decision to eliminate the Appellant's right to continuing back pay flies in the face of Board law because the decision was reached without the benefit of the full resolution of disputed facts. In fact, no hearing has been afforded to the Appellant as to the Employer's continuing obligation to make the Appellant whole. In particular, there remain material facts as to whether the Employer has fulfilled the terms of the Settlement Stipulation, whether the Appellant has been made whole under the terms of the Settlement Stipulation, and whether the Employer is excused from paying back pay benefits on the flawed theory that the Appellant would have likely retired. The determination of these issues *can only be resolved on the basis of competent evidence before an Administrative Law Judge* – as opposed to being summarily resolved.

On May 10, 2010, Regional Director, James Small, issued a compliance determination letter opining that the Appellant should not be entitled to any back pay beyond the date of his early retirement – March 2007– when he attained the age of 60. The decision to terminate the Appellant's right to continued back pay, however, is not justified by any formal finding of fact, but rather, was guided by the Regional Director's mere opinion that it would not serve the

remedial purposes of the Act to extend the Employer's back pay obligation. While the Regional Director may well have felt that the Appellant has been made whole, the personal opinion and belief of the Regional Director should not warrant the setting aside of the Appellant's judicially-enforced back pay order.

The Appellant is entitled to submit evidence concerning his work expectancy because that is the only fair and objective measure of when he would have terminated his employment. To dictate otherwise (as was the case herein) would constitute a complete departure from the well-defined legal standards requiring a formal hearing and findings of fact justifying the limitation of any back pay award – not the mere fiat of the Regional Director. See *M Restaurants, Inc. v. NLRB,* 621 F.2d 336, 337-338 (9th Cir. 1980) (Recognizing that the issue of whether a "back pay liability should be appropriately adjusted" is *"a determination that is largely a question of fact for the Board."*)(Emphasis added.)

B. THE APPELLANT IS PREPARED TO DEMONSTRATE THAT HE WOULD HAVE MAINTAINED EMPLOYMENT WITH THE EMPLOYER BEYOND MARCH 2007

The Appellant vigorously contests Regional Director's denial of his back pay benefits because the Appellant is prepared to show that his work expectancy would have exceeded the cutoff date arbitrarily designated by the Regional Director–i.e., March 2007. The Appellant is prepared to testify that he, like very many other postal service employees, would have worked beyond the age of 60, had it not been for the unlawful conduct of the Employer which has rendered him psychologically unfit to return to work to this day.

A review of the Appellant's testimony and the facts surrounding the Appellant's employment prior to the unfair labor practice is absolutely necessary to determine the Appellant's work expectancy. On this score, the Appellant is prepared to testify that he would have worked through the age of 70 and, at least, up until the date he would have accrued full retirement benefits. See e.g., *Gotthardt v. National Railroad Passenger Corporation,* 191 F.3d 1148 (1999) (affirming grant of front pay through retirement age of 70); *Shore v. Federal Express Corp.,* 42 F.3d 373, 378 (6th Cir.1994) (affirming grant of front pay through retirement age of 65.)

With respect to his work history, there is no dispute that the Appellant maintained an exemplary work and attendance record as a Vehicle Maintenance Supervisor after his promotion. The Appellant would have continued to maintain a positive work history but for the retaliation he suffered as a result of engaging in protected activities.

Unfortunately, the Regional Director has considered no evidence concerning the Appellant's work expectancy. Rather, the sole basis that the Regional Director has offered for terminating the Appellant's back pay is his personal view (which neatly coincide with the Employer position) that the Appellant has simply received back pay for too prolonged a period. The Regional Director has not considered any evidence as to whether the Appellant would have sought early retirement or whether similarly situated employees would have sought early retirement. In short, the Regional Director has issued a decision which has discriminatorily and punitively imposed a mandatory retirement age on the Appellant.

C. THE REGIONAL DIRECTOR HAS PROVIDED NO ADEQUATE BASIS FOR CONCLUDING THAT ANY FURTHER BACK PAY WOULD BE PUNITIVE IN NATURE

The Regional Director's decision to terminate the Appellant's right to back pay is based on various patently unfounded assumptions set forth in the Regional Director's May 10th compliance determination letter.

A critical flaw in the Regional Director's decision is his mischaracterization of the Appellant's back pay award as "punitive" in nature. This is a classic strawman argument. Indeed, there is no dispute that a back pay award should not be "punitive." However, at no time has the Appellant ever suggested that his right to back pay should last indefinitely. Rather, the Appellant merely expects that the Employer fully and fairly comply with the Settlement Stipulation, executed on June 10, 1993, which guarantees that the Appellant be made whole "for any loss of pay and benefits he may have suffered, and may continue to suffer, as a result of his demotion from his position as a supervisor." (Emphasis added) To this end, the Appellant merely seeks a back pay award that fairly coincides with his future work expectancy and comports with the protections guaranteed to him under the Settlement Stipulation. At minimum, the Appellant should have been entitled, as a matter of basic

fairness and due process, to adduce evidence delineating his work expectancy.

While the Employer has, at all relevant times, been afforded the opportunity to present evidence concerning the Appellant's work expectancy, no competent evidentiary showing has been made. It is not now appropriate for the Appellant's back pay award to be eliminated *sua sponte* by the Regional Director due solely to the Director's ill-informed view that it is "punitive" in nature.

As set forth in his May 10th compliance determination letter, the Regional Director's personal opinion that the back pay award is "punitive" is, ostensibly, derived from his misconceptions (1) that Board precedent does not justify an award of back pay beyond the first possible date of retirement eligibility, (2) that it would not be fair to require the Employer to pay back pay beyond the date that "nearly all employees would commonly retire"; (3) that a perpetual back pay remedy is the only possible alternative to cutting off the Appellant's back pay award at the time of his early retirement; and (4) that the Appellant has already become eligible for "full retirement" under the Civil Service Retirement System ("CSRS"). These contentions are incorrect and unfounded.

1. BOARD PRECEDENT DOES NOT MANDATE THE TERMINATION OF BACK PAY UPON EARLY RETIREMENT ELIGIBILITY

First, with respect to Board precedent, the Regional Director fails to cite any case authority prohibiting the continuation of back pay past an employee's first possible date of retirement eligibility. In reality, the instant case presents very unique issues that have never before been decided by the Board. The two cases relied upon by the Regional Director – *Graves Trucking, Inc. v. NLRB*, 692 F.2nd 470 (7th Cir. 1982) and *Brown Company*, 305 NLRB 62 (1991) – are distinguishable. The *Graves Trucking, Inc* and *Brown Company* certainly do not stand for the proposition that the Regional Director may unilaterally choose to cut off all back pay benefits for the simple reason that the Appellant may have been eligible to apply for retirement benefits.

In *Graves Trucking, Inc.*, the Board had, initially, approved and issued an order which granted an employee – who had been choked by a supervisor – a back pay remedy making him "whole for any loss of earnings he may have suffered, or will suffer, as a result of

Respondent's unlawful conduct against him until a reasonable period after his injury resulting from said unlawful conduct no longer precludes him from performing his former or a substantially equivalent job with Respondent, or any other employer, plus interest." *Graves Trucking, Inc.*, 246 NLRB 344, 345-346. Significantly, the Board had made it clear that the appropriate means to remedy the aggrieved employees injury was to grant him an back pay remedy – without qualification – that would last until after the time of his recovery. It was only at the enforcement stage, in *Graves Trucking, Inc. v. NLRB*, 692 F.2nd 470 (7th Cir. 1982), that the Seventh Circuit Court enforced the Board's award only to the extent that it was limited to a duration of two years. The Regional Director's reliance on the enforcement order of *Graves Trucking, Inc.* is wholly misplaced.

Unlike in *Graves Trucking, Inc. v. NLRB*, the Ninth Circuit court of appeals in the instant case chose to enforce the Board's make whole back pay order in full. If any significance can be drawn from the *Graves Trucking, Inc.* case, it is the basic principle that Board remedies are intended to restore aggrieved employees to "as nearly as possible to the economic position they would have enjoyed in the absence of the unlawful conduct" and, further, to "discourage and remedy in full" any such unlawful conduct. *Graves Trucking, Inc.*, 246 NLRB 344, 345. As the Board recognized in its initial order in *Graves Trucking, Inc.*, the only way to truly achieve these ends was to issue a make whole order that guaranteed that the injured employee would continue to receive back pay until his injury was finally healed. *Id.* at 345-346. It was only at the enforcement stage that the Board's make whole remedy came under scrutiny. Hence, the Regional Director's suggestion that any "Board precedent" reflected in *Graves Trucking, Inc.*, warrants his position is wholly disingenuous.

There is no dispute that the Seventh Circuit and the Ninth Circuit clearly differed in how to enforce the Board orders in their respective cases. However, for our purposes, the bottom-line is that the Ninth Circuit enforced the Board's broad back pay award in its entirety a very long time ago at the enforcement stage. Whatever persuasive value the Seventh Circuit's opinion had in *Graves Trucking, Inc.* ended once the parties got past the enforcement stage. The parties are well past the enforcement stage. The Ninth Circuit enforced the Board's broad back pay award in its entirety and without qualification. The Regional Director cannot

now cite the Seventh Circuit's opinion in *Graves Trucking, Inc.* for the proposition that the Ninth Circuit's decision to enforce the award was inconsistent with Seventh Circuit precedent.

The second case cited by the Regional Director, *Brown Company*, 305 NLRB 62 (1991), is even less analogous to our case. In *Brown Company*, the Board determined that an employer's transfer of its cement hauling operations – in 1977 – constituted a violation of 8(a)(1) and (5) of the Act because the sole purpose of the action was to abrogate and escape the employer's contractual obligations with a union. *Id* at 63. After unlawfully relocating its cement trains, the employer terminated all operations in April 1988. The central holding in *Brown Company* was merely that an employer may be excused from paying back pay in cases where it completely ceases operations. *Id.* at 62. This, of course, is not the case at all herein.

Significantly, *Brown Company* did address the question of an employer's duty to pay back pay benefits beyond early retirement. Specifically, one claimant-employee, Robert Reilly, had selected early retirement after the employer's unlawful relocation due to a severe arm injury he suffered. *Id.* at 62. Despite his efforts, Mr. Reilly was not able to perform the job of cement mixer and, therefore, chose to voluntarily retire at the age of 60 – which was approximately three years prior to the date he planned to retire. The employer seized on the Mr. Reilly's early retirement to argue that back liability should have been tolled as of the exact date Mr. Reilly retired – as opposed to the later date when the employer ceased operations . Rejecting this contention, the ALJ held that there was no justifiable basis for the employer to benefit from Mr. Reilly's forced early retirement. Accordingly, the ALJ held that Mr. Reilly's forced early retirement had no tolling effect. *Id.* at 72-73.

The ALJ observed that "there is no case holding that the Act, or general principles, precludes a backpay award because a period of that length is too prolonged." *Id.* at 73. Thus, in the Appellant's case, provided that some fair and reasonable measure of back pay that can be determined through the submission evidence and findings of fact, there is no justifiable basis for the Regional Director to summarily curtail the Appellant's right to continued back pay.

2. THE REGIONAL DIRECTOR OFFERS NO EVIDENTIARY FOUNDATION FOR CONCLUDING THAT THE VAST MAJORITY OF SIMILARLY

SITUATED EMPLOYEES WOULD HAVE CHOSEN EARLY RETIREMENT

One of the more outrageous assumptions made by the Regional Director is the presupposition that back pay should be tolled as of Appellant's early retirement eligibility date – March 2007 – because "nearly all employees would commonly retire" at the first early retirement age. The Regional Director offers no facts or evidence upon which this arbitrary conclusion is made. The Regional Director's comment is, ostensibly, derived from the March 2010 compliance stipulation, which states, at footnote 1:

> In view of the facts that the vast majority of individuals covered by the CSRS retire on the last day of the month in which they become eligible for retire (or on the first three days of the month they become eligible), the Postal Service's obligation has been calculated through March 31, 2007.

The Appellant objects vigorously to the Regional Director's contention that the "vast majority" of federal employees opt for early retirement. To begin, this is nothing more than self-serving speculation offered in lieu of evidence. When the Appellant contacted Regional 21 to determine what evidence relied upon to draw this conclusion, he was informed by Field Attorney Cecilia Valentine that this was merely the "general understanding" of Region 21's staff. Secondly, even assuming arguendo that such speculation were correct, there is no indication whether the "vast majority" referred to by the Regional Director encompasses similarly situated postal service employees. In light of a worsening economy, it begs to reason whether the "vast majority" of federal employees contemplated by the Regional Director are in a position to retire at the first opportunity. Lastly, whether other similarly-situated federal employees choose to retire early is merely one factor for Regional Director to consider.

3. A PERPETUAL BACK PAY AWARD IS NOT THE ONLY ALTERNATIVE TO THE REGIONAL DIRECTOR'S DETERMINATION TO CUT OFF THE APPELLANT'S BACK PAY BENEFITS UPON HIS ELIGIBILITY FOR EARLY RETIREMENT

It goes hardly without saying that no one has stated that the Appellant should recover a "perpetual" award of back pay. Rather, the Settlement Stipulation, executed on June 10, 1993, simply mandates that the Employer shall make the Appellant whole *"for any loss of pay and benefits he may have suffered, and may continue to suffer, as a result of his demotion from his position as a supervisor.* The Board has been tasked with the duty of assisting the Employer in

complying with this obligation through compliance hearings. In an effort to derail the compliance procedure, the Regional Director has declared that the Appellant's right to back pay must be terminated retroactively to the date of his eligibility for early retirement. The flaw in the Regional Director's reasoning is conspicuously apparent when one considers his view that the *only* alternative to retroactively terminating back pay is to "continue the back pay obligation without any ending point." This position is patently illogical and, in fact, shows desperation on the part of the Regional Director to end this case. The Regional Director knows full well that other options are available besides a "perpetual" award of back pay benefits. However, no reasonable, good-faith alternatives are even considered by the Regional Director short of a complete forfeiture of benefits. If allowed, the Appellant can and will show that his work expectancy would have lasted beyond early retirement and, further, that he planned to retire on a date certain.

4. THE APPELLANT HAS NOT ALREADY BECOME ELIGIBLE FOR FULL RETIREMENT UNDER THE CIVIL SERVICE RETIREMENT SYSTEM

As reflected in his May 10th compliance determination letter, the Regional Director stated: "[i]t is *my understanding* that Pappas became eligible to apply for *full retirement/pension benefits* under the Civil Service Retirement System ("CSRS") as of in or around March 2007" and, further, that "[b]ased on this understanding, I have determined that it would not serve the remedial purposes of the Act to extend the Employer's backpay liability beyond that date." (Italics added.) Unfortunately, the Regional Director's presumption that the Appellant became eligible for full retirement is completely factually incorrect.

In reality, the Appellant can only receive "full retirement" once he completes 41 years and 11 months of service. In the Annuity Estimate the Appellant received from the National Retirement Counseling System, dated April 16, 2010, the Appellant was notified, *inter alia*, that: "[m]aximum service credit for annuity is 41 years, 11 months, which [would] provide 80% of [his] high-3 average salary." Thus, instead of obtaining his full retirement on March 2007, after 30 years of service, the Appellant has yet to achieve approximately 8 more years of service to receive full retirement.

Due to his misunderstanding of what "full retirement" entails, the Regional Director has wrongly presupposed that the Appellant had been the awarded the most complete relief possible toward putting the Appellant back into the position he would have been in but for the Employer's unlawful conduct – i.e., eligibility for "full retirement." As such, granting this appeal would now allow the Board to determine whether the point of full retirement should be reconsidered as an appropriate ending point for the Appellant's work expectancy. Because the Regional Director's compliance determination specifically turned upon this fact, the Appellant should be given an opportunity to correct the Regional Director's error. At minimum, this matter should be resolved on the basis of competent evidence before a hearing.

D. THE REGIONAL DIRECTOR'S DECISION AMOUNTS TO A FORCED EARLY RETIREMENT IN CONTRAVENTION OF ANTI-DISCRIMINATION PRINCIPLES

The Regional Director takes the position that the Appellant has been made whole. However, making a discriminatee whole involves placing him or her in the same position they would have occupied but for the unlawful conduct. But for the unlawful conduct in the Appellant's case, he would have continued to work until he decided to retire. There is no mandatory retirement age for postal workers such as the Appellant because both federal and state law prohibit age discrimination in employment. If the Employer attempted to compel the Appellant to retire based simply upon the fact that he reached retirement eligibility, it would violate age discrimination laws. Here, the Employer is doing that exact thing, but rather than through its own hand, it is doing it through the *sua sponte* processes of the National Labor Relations Board.

The Regional Director erroneously construes the Appellant's diagnosis of total disability as the mere opinion of the Appellant's "medical provider, which opinion has not, and may never, change." In a telling sign of the Regional Director's bias and lack of interest in this case, the Regional Director has erroneously referred to Peter J. Weingold, the OWCP-designated physician, as "Pappas' medical provider." In erroneously describing Dr. Weingold as the Appellant's "medical provider," the Regional Director has cast aspersions on the legitimacy of the findings made as to the Appellant's psychological state. Indeed, if there was any doubt in

the mind of the Regional Director as to the credibility of the Appellant's psychological fitness (which seems to be the case), such doubt would clearly explain the Regional Director's desperate effort to terminate the instant compliance proceedings.

What is most disturbing about the Regional Director's decision is that it discriminatorily punishes the Appellant for having suffered the misfortune of being severely injured by the Employer's conduct. By formal finding of the OWCP, the Appellant has been conclusively determined to be totally disabled by the unlawful and egregious conduct of the Employer. As a result of the severe psychological injury he has suffered, the Appellant is unable to mitigate his damages by returning to work. Unlike employees who suffer only a partial disability, and are able to survive through subsequent employment, the Appellant's life has been destroyed by the Employer. Yet, rather than holding the Employer to account for its misconduct, the Regional Director has seen fit to simply proclaim – without any legitimate legal foundation – that any further back pay would be "punitive in nature."

E. THE APPELLANT CONTENDS THAT THERE ARE ERRORS IN THE REGIONAL DIRECTOR'S IMPLEMENTATION OF THE BOARD BACK PAY SETTLEMENT

The Appellant finally takes the position that further compliance proceedings are warranted because there exists a dispute of fact over the appropriate amount of retirement withholdings that the Employer was lawfully permitted to deduct from the Appellant's gross back pay during the settlement period. At minimum, the Board should order the Regional Director to reinstate compliance proceedings to correct errors and defects in the Employer's calculation of the Appellant's back pay award. Even assuming *arguendo* that the Regional Director's decision to cut off the Appellant's back pay is affirmed (which we vigorously contest), the Appellant should have the right to have considered the correct amount of the Appellant's retirement will be substantially reduced if the Regional Director does not afford the Appellant to raise this issue at a compliance hearing.

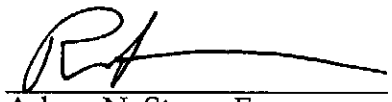
IV. CONCLUSION

In light of the foregoing, the Appellant respectfully requests that all material issues concerning of his continued right to back pay be resolved through formal findings of fact by an Administrative Law Judge after an evidentiary hearing. Accordingly, the Appellant requests

that a hearing be scheduled as soon as practicable.

Dated: September 13, 2010

LEVY, STERN, FORD & WALLACH

By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my address is 3660 Wilshire Blvd, Suite 600, Los Angeles, California 90010. I declare that I am employed in the office of a member of the bar of this Court at whose direction this service was made.

On September 13, 2010, I served the following document(s) **REQUEST FOR REVIEW OF GENERAL COUNSEL'S DENIAL OF APPEAL FROM REGIONAL DIRECTOR'S ADMINISTRATIVE DETERMINATION TERMINATING BACK PAY** on interested parties in this action:

SEE ATTACHED SERVICE LIST

☐ via facsimile

☒ I enclosed document(s) in a sealed enveloped to the above referenced person(s) and addresse(s), by placing the envelope for collecting and mailing, following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services, in a sealed envelope with postage pre-paid.

☐ by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am "readily familiar" with the firm's practice of service of process. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of business.

I declare under penalty of perjury that the above is true and correct.

Executed on September 13, 2010, at Los Angeles, California.

Diane Morgenstern

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